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NO. 276

IN THE

Supreme Court of the United States

October Term, 1961

EMMETT GRAY, *Petitioner*

VERSUS

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP.,
Respondents

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Emmett Gray, respondent, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the interlocutory decree of the United States District Court for the Southern District of Texas in favor of the libellants Edwin E. Johansson, Kansas City Bridge Co., Merritt-Chapman & Scott Corp., and Pelican Island Development Corp., and remanding the cause for proof of damages.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 287 F. 2d 852 and appears *infra Appendix*, p. 33, *et seq.* The opinion is reported also at 1961 A.M.C. 703, but inaccurately in its original version, which was later corrected by order of the Court of March 27, 1961. The unreported opinion of the United States District Court, its Findings of Fact and Conclusions of Law, is printed *infra* Appendix, p. 39, *et seq.*, and at R. 874-887.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 15, 1961, and copy thereof is printed *infra* Appendix, p. 51. Thereafter petitioner presented to the Court of Appeals petition for rehearing, which was denied without further opinion on May 3, 1961.

Jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C., Sec. 1254 (1).

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

I.

Whether the "pilotage clause" generally agreed upon between ships and their towing tugs in American harbor movements is lawful, particularly under these circumstances:

An ocean-going vessel with her master in command upon her bridge and with a full crew at their stations but without motive power, was being shifted by tugs within the confines of Galveston harbor. A licensed pilot, but an

employee of the company which was the charterer and operator of the tugs, was on the bridge as "dead-ship" pilot. On the advice of this pilot, the master ordered the ship's crew to drop the vessel's anchor, clearly an act of pilotage or vessel management and not of towage. The anchor struck a submerged pipe line. The tugs were in no way involved and were absolved from any liability.

The contract between the vessel's operator and the tug owner contained no words attempting to relieve the tugs or those connected with them for responsibility for negligent *towage*, but it did provide that any pilot upon a towed vessel was the servant of the vessel, and that neither the tugs nor their owners or agents or charterers would be liable for any acts of the pilot.

Did your Honors hold in *Bisso v. Inland Waterways Corporation*, 1955, 349 U. S. 85, that such a *pilotage* clause was invalid, as the Courts below have held, or is such a *pilotage* clause valid particularly where the negligence claimed is an act of *pilotage*, as your Honors have held in *Sun Oil Company v. Dalzell Towing Co.*, 287 U. S. 291, and in *United States v. Chris Nielson*, 349 U. S. 129, decided on the same day as *Bisso*, and as has also since been held in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and in all other decisions where a *pilotage* clause similar to the one in the contract here was at issue?

II.

In the belief that prominent signs marked the location of submerged pipe lines in a harbor, a vessel drops her anchor. The pilot does not actually know the exact location of the pipe lines, and the anchor strikes one of the two

pipe lines. The sign at one end of the pipe lines is placed some thirty-one feet away from the lines and the sign at the other end is placed some one hundred fifteen feet away, and had the lines lain between the signs neither would have been so struck by the anchor. Is the duty of the pilot (and the ship) to know where navigational obstructions are located *absolute*, so that where he does not have actual knowledge of their location obtained by taking soundings or otherwise he is wholly at fault, as the Court below has held, or is he held instead to a high standard of ordinary care, as your Honors have held in *Atlee v. Packet Company*, 21 Wall. 389, so that the pipe line owner is not absolved from its fault in failing to mark where the pipe line lays in the navigable waters as held in *The Georgie*, 9 Cir., 14 F. 2d 98, *The Steam Dredge No. 6*, 2 Cir., 241 F. 69, and recently in *Essex County Electric Co. v. M/S Godafoss*, D.C. Mass., 1955, 129 F. Supp. 657?

III.

An ocean-going vessel in command of her master and with a full crew aboard and at their stations is being shifted by tugs in a harbor. The vessel's engines are being worked upon and not in use. Upon the bridge with the vessel's master is a licensed pilot, an employee of the company operating the tugs and designated by it to act as a "dead-ship" pilot. On the advice of this pilot but as his own independent order, the master has the crew drop the vessel's anchor, which strikes a submerged pipe line. Both the pilot and the master rely upon pipe line warning signs in the dropping of the anchor.

The vessel being held liable *in rem*, is it entitled to recover by way of indemnity from the pilot, as the Court below has held, or is the vessel (through her master) a

joint tort-feasor with the pilot and not entitled to contribution (and hence indemnity) from the other tort-feasor, as your Honors have held is the applicable rule in admiralty as well as at common law in *Halcyon Lines v. Haenn Ship Co.*, 342 U. S. 282?

STATEMENT

This is a suit for damages to one of the two submerged pipe lines caused by its being struck by an anchor dropped from a vessel being turned to enter a slip of the Port of Galveston, Texas. The slip was known as Slip "A."

The suit was in admiralty, and jurisdiction in the District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 Stat. 931, Title 28, U. S. Code, Sec. 1333(1), amended Act of May 24, 1949, c. 139, Sec. 79, 63 Stat. 101, and Act of June 19, 1948, c. 526, 62 Stat. 496, Title 46, U. S. Code, Sec. 740.

Suit for damages in excess of $280,000 was brought by libellants as those at interest upon the pipe line against the M/V HAR CANAAN, from which the anchor was dropped, and her operator, and against the assisting tugs and their owning and operating companies, and by later amendment against the pilot of the M/V HAR CANAAN, petitioner Emmett Gray. Cross-pleadings were filed.

The evidence was largely without dispute, and with the exception of the facts surrounding the issuance of the order to drop the anchor, is with reasonable accuracy though it is respectfully submitted too briefly summarized by the District Court in its Findings of Fact, printed below at Appendix, p. 40.

Briefly, these are the controlling facts:

Pursuant to a permit issued by the United States Corps of Engineers, on January 27 and 28, 1958, libellants laid

two pipe lines in a dredged trench on the bottom of Galveston harbor. On the Galveston Island end, the lines came out of the water about eighteen feet from the eastern side of Slip "A." From this point at the entrance to Slip "A" the pipe lines ran almost at a right angle to the center line of the channel directly across Galveston harbor to a point opposite Slip "A" on Pelican Island.

The last of three Notices to Mariners relative to the pipe lines was issued on January 16, 1958, and it notified navigation interests of the location of the pipe lines, stating that the lines would run between Pier 41 (which is immediately adjacent to and to the east of Slip "A") and Pelican Island, and that "the location of the pipe lines is marked by warning signs on Pier 41 and on Pelican Island."

Instead of the location being so marked, the sign on Pier 41 was in fact placed at its nearest point to them some thirty-one feet east of the end of the pipe lines, and the sign on the Pelican Island side across the harbor was placed on a platform in the water east some one hundred fifteen feet from the pipe lines.

The two pipe lines were laid on January 27 and 28, and at no time between the time of their laying and the time of the casualty on March 21 were the pipe lines ever found to be farther apart than ten feet and actually were crossed and had to be pulled apart on March 3, R. 596, 599, and were pulled farther apart also on March 16 near their Galveston Island end when found there to be only one and one-half feet apart. R. 601-603.

The anchor struck the westernmost of the two pipe lines. Since there was no evidence that the other line was touched by the anchor, and since this line as stated lay no more and probably less than ten feet from the one struck by the

anchor, it is manifest that had the pipe lines lain between the warning signs neither would ~~not~~ have been struck.

On the morning of March 21, the M/V HAR CANAAN was performing routine maintenance work upon her engines and had no motive or rudder power, but in order that her loading could continue it was desired to shift her from the berth where she then lay about two miles through Galveston harbor waters to another berth in Slip "A." Her agent notified the tug company, that the vessel was to be shifted "dead-ship," by the course of dealing it being understood that she had no motive power and that tugs and a pilot were to be sent to her. Petitioner Emmett Gray was sent to act as pilot along with three tugs for power.

When he went aboard the vessel Captain Gray explained to the master that it would be necessary to drop the ship's anchor to assist in turning the vessel when Slip "A" was reached, and the master approved this planned maneuver, giving orders to his crew to have the anchor ready.

The vessel was then moved by the tugs through the harbor to Slip "A." During the entire time of this shifting, the tugs were directed by the pilot Captain Gray, but the master was in command and ~~had~~ with him on the bridge was the third officer, her full crew was aboard the vessel, and the vessel's chief officer with the required number of seamen were manning their deck stations.

When the vessel was near Slip "A," the pilot told the master the anchor should be dropped. The master testified that he then checked the prominent signs warning of the pipe line crossing and only after making sure the anchor would drop well clear of any lines did he permit the ship's third officer to transmit the order to the chief officer and crew forward, who dropped the anchor. R. 681-683.

Captain Gray testified that he knew generally that pipe lines were being laid across the harbor between Pier 41

and Pelican Island but had not actually sighted them nor while they were being worked on had before this time piloted a ship in their vicinity nor had read the Notices to Mariners dealing with them. In giving the order or advice to the master to drop the anchor he relied on the warning signs as to the location of the lines. (Captain Gray's recollection was that the master gave the order to drop the anchor before Gray pointed out the signs to him; the master testified positively, however, that he asked Gray about the signs and himself checked them to be sure the anchor would fall clear before giving the order to his crew to drop the anchor. R. 681-683.)

There was no evidence that the three tugs furnishing the motive power for the movement of the vessel were in any way at fault.

For sometime prior to the day of the casualty, those tugs which assisted in the movement of ocean-going vessels within the harbors of Galveston and some other Texas ports, i.e., which were used in the harbor towing of deep-sea vessels such as the M/V HAR CANAAN, were owned by three separate towing companies. One of these was Bay-Houston Towing Company, whom the operator of the M/V HAR CANAAN by signed contract engaged to provide all the tugboat power it required.

These three owning companies made all agreements with ship operators requesting the services of towboats, but did not actually operate the tugs. The tugs were chartered bareboat to an operating company, G. & H. Towing Company, that manned and operated them, so as regardless of ownership to utilize the tugs most efficiently in assisting vessels needing tugboat power.

Only at Galveston, where the state-licensed bar pilots before the time of this casualty did not offer pilotage ser-

vices for such ships, did the three towing companies offer to furnish pilotage for ships without motive power. But these owning companies did not themselves employ any pilot to perform such services: they requested G. & H. Towing Company to furnish a pilot to perform their contracts.

To act as such pilot for a ship without motive power, G. & H. Towing Company designated its port captain, petitioner Emmett Gray. Captain Gray was licensed by the United States Government to act as pilot for the waters of Galveston harbor, but he held no license as a bar pilot from the State of Texas and was not a member of the Galveston Pilots Association.

While, as stated, the operation of the tugs was done only by G. & H. Towing Company, their charterer, the three owning companies maintained separate soliciting offices and were actively competitive with each other, for they and not G. & H. Towing Company made the contracts with steamship operators for tug services and billed for the services, and only the company having such contract received thirty-five per cent of the amounts paid. Even if it owned the tug which performed the service unless it had the contract with the steamship operator the owning company received none of the revenue derived from that particular towing job. In each instance the charterer, G. & H. Towing Company, received sixty-five per cent of the revenues earned, being paid by the contracting owning company and not by the steamship operator. R. 784-785.

Where in Galveston harbor pilotage services were furnished a ship without motive power, the contracting towing company kept thirty-five per cent of the charge made the ship, paid G. & H. Towing Company sixty-five per cent, and out of its sixty-five per cent G. & H. Towing Company paid Captain Gray $20.00. R. 787.

There is not an iota of evidence that to secure tug services in Galveston or elsewhere steamship operators were in any way required to sign any agreement with any of the towing companies as a condition of receiving the services of tugs, but if a steamship operator did sign an agreement by whch it agreed to obtain all of the tug services it needed only from the one owning company with which it contracted, it obtained the tug services at a ten per cent discount off the tariff rates. Appendix IV, p. 52.

The charterer of the M/V HAR CANAAN, Maritime Overseas Corporation, had before the casualty signed such an exclusive contract with Bay-Houston Towing Company, and it received the ten per cent discount for the tug hire and the pilotage furnished the vessel on the day in question, paying the sums due to Bay-Houston Towing Company. R. 727-729.

There were no material differences between the contracts offered steamship operators. Each contained a provision allowing the use of tugs other than those owned by the contracting towing company like this:

> "Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs."

And each contained a "pilotage clause," as follows:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of

> all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and nine of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

Each contract also contained as part of the tariff for Galveston-Texas City the provision:

> "Pilotage-Shifting Vessels Without Own Power. . . $60.00."

Nowhere in the tariffs, nor in the contract signed by Maritime Overseas Corporation with Bay-Houston Towing Company covering the movement of the M/V HAR CANAAN on the day of the casualty, is there any language which could conceivably be read to mean that the towing companies contracted to move vessels from one location to another. The company offered and agreed *only* to provide *tugboat power*, and the rates charged were only *for each tug furnished*, though these rates of course varied with the distance the tug assisted the vessel. Appendix V, p. 55.

The Trial Court found that petitioner Gray was negligent in giving the order to drop the anchor, which fell on the pipe line, the "presence" of which he should have known from other sources and from the prominent warning signs but as to the location of which he was not misled by the position of the warning signs. The master of the M/V HAR CANAAN was found not at fault because

"the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master." Petitioner was held liable personally for his negligence, and G. & H. Towing Company liable because he was its employee, and the M/V HAR CANAAN liable *in rem* for the negligence of petitioner "as her pilot." The vessel was allowed indemnity from both petitioner and G. & H. Towing Company.

The towing tugs and their owners were found not liable.

The exculpatory provisions of the pilotage clause of the contract with the vessel's operator were held to be void, reliance being placed upon *Bisso v. Inland Waterways Corporation*, 349 U. S. 85, on the ground that the monopolistic situation in Galveston harbor gave no freedom of choice to vessels in the type of towing contract offered and to secure tugs vessels had to agree to such exculpatory provisions. *Sun Oil Company v. Dalzell Towing Co., Inc.*, 287 U. S. 291, was distinguished.

The Court of Appeals affirmed, petitioner Gray's negligence being found to be a failure to use due care "to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines he dropped the anchor on them." No mention is made of the master of the M/V HAR CANAAN.

After thus imposing upon petitioner Gray an absolute duty to know the exact location of the pipe lines, the Court below agreed the pilotage clause was invalid under the *Bisso* decision and distinguished the case of *Sun Oil Company v. Dalzell Towing Company* as one dealing "with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots" and stated petitioner was not such a pilot, the case really being merely one where G. & H. Towing Company

furnished a towing service to a dead ship and its port captain conducted it. The liabilities of the M/V HAR CANAAN and of Maritime Overseas Corporation were then affirmed *under the law governing pilotage*. (The Court of Appeals by its order of March 27, 1961, corrected its statement that Maritime Overseas Corporation had been found liable *in personam*.)

REASONS FOR GRANTING THE WRIT

Your Honors should grant writ of certiorari in this cause for the following reasons:

(1) To correct the manifest error of the Court of Appeals in refusing to follow the settled law that an exculpatory pilotage clause such as that in the contract here is valid and not contrary to public policy and unenforceable, there being not a single other American decision so holding, and your Honors having expressly upheld as valid such a clause in *Sun Oil Company v. Dalzell Towing Co.*, 287 U.S.291, and having as recently as 1955 affirmed the validity of such a clause in *United States v. Chris Nielson*, 349 U.S 129, decided the same day as *Bisso v. Inland Waterways Corporation*, 349 U.S. 85. We respectfully submit that the Court is in plain error in holding applicable to this case of *pilotage* the decision in *Bisso v. Inland Waterways Corporation*, which only held invalid a broad *towage* freedom-from-liability clause, and in declaring the *Sun Oil Company v. Dalzell Towing Co.*, case inapplicable as one of "publicly licensed involuntary or compulsory pilots," that *Dalzell* case being clearly one where no compulsory pilot was at all involved and being instead one where the captain of one of the assisting tugs directed the ship maneuver. We further earnestly submit the decision below is in direct

conflict with the recent decisions in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and with all other decisions where the pilotage clause has been directly at issue. Since a similar pilotage exculpatory clause is, as far as petitioner can tell from the decisions, at use in every American port, this decision if left unreversed would tend to upset an important segment of American maritime law and contracts under which most ocean-going vessels are moved in American harbors.

(2) To correct the error of the Court of Appeals in imposing an absolute duty upon a pilot to know the exact location of obstructions to be avoided in the navigation of a vessel and in thus absolving persons obstructing navigable waters from the duty to give warning to those using such waters of the location of such obstructions, this decision being in conflict with the decision of this court in *Atlee v. Packet Company*, 21 Wall. 389, holding that pilots are not absolutely liable but are required only to exercise due care, and also in conflict with the settled law as set forth in the decisions of *The Georgie*, 9 Cir., 14 F. 2d 98, and *The Steam Dredge No. 6*, 2 Cir., 241 F. 69, that in navigable waters the right of navigation is paramount and that persons obstructing them are liable for failure to mark properly such obstructions.

(3) To correct the error of the Court of Appeals in requiring a voluntarily engaged pilot to indemnify the vessel from its *in rem liability*, where the master of the vessel actively participated in the negligent act for which the pilot and the vessel are held liable, the decision being directly contrary to the settled law as set forth in the

decisions of this Court in *Ralli v. Troop*, 157 U.S. 386, and *The Oregon*, 158 U.S. 186, that the presence of a pilot does not relieve the master of his responsibility for the proper navigation of his vessel, and contrary to the correct rule so recognized by the Court of Appeals below itself in *Charente Steamship Co. v. United States*, 5 Cir., 1926, 12 F. 2d 412; requiring the pilot to indemnify the vessel thus being contrary to the decision of your Honors in *Halcyon Lines v. Haenn Ship Co.*, 342 U.S. 282, that there is no right of contribution (and hence indemnity) between joint tort-feasors in admiralty just as at common law.

ARGUMENT

I.

With all respect, petitioner respectfully submits that the Court below has confused the decisions which hold invalid clauses exempting companies and tugs from liability for *negligent towage* with the decisions which uphold the validity of exemptions from liability for acts of *pilotage*. We submit that this is abundantly clear from a careful reading of *Bisso v. Inland Waterways Corporation*, striking down *towage* exemptions and carefully affirming the correctness of decision of *Sun Oil Company v. Dalzell Towing Co.*, where the exemption is a *pilotage* exemption as here, and a careful reading of *United States v. Chris Neilson*, which also affirms the validity of *pilotage* exemptions and states *Bisso* voids only *towage* exemptions.

The consequences of this mis-reading of those decisions are that petitioner, acting as pilot for the M/V HAR CANAAN, and paid for such services $20.00, is denied the protection of the pilotage exemption to which the Court of Appeals acknowledges he would be entitled

since it provides "in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, his employee, indeed its port captain." Petitioner is therefore held liable for damages stated to be in excess of $280,000.00, and instead of being allowed indemnity from the vessel operator as he would be had the case been correctly decided, is held to indemnify the vessel!

Petitioner respectfully submits that this decision is contrary to the settled American maritime law governing in circumstances such as these.

The Contract Afforded Exemption for Pilotage Faults, Not for Towage Faults

The contract between Bay-Houston Towing Company and Maritime Overseas Corporation, operator of the M/V HAR CANAAN, is reproduced at Appendix V, p. 55, below.

A mere reading of the contract reveals that there is *no mention made of any exemption* of the tugs, their operators, or their owners *for any faults in performing towage services.* There is not one word in the contract to that effect.

On the other hand, the contract in several places expressly says that the company only agrees to furnish *tug power*, and expressly provides against liability for the acts of "any pilot" on board an assisted vessel. This clause reads:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or

> otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

It will have been noted that the Court of Appeals has by implication held that had this clause been valid, it would have protected petitioner Gray.

There can be no doubt that petitioner comes within the language of the clause. Petitioner Gray was in the regular employment of G. & H. Towing Company, the charterer of the tugs which assisted in the shifting of the M/V HAR CANAAN, not as a tugboat pilot but as its port captain. He was a licensed pilot. Bay-Houston Towing Company agreed by the contract with Maritime Overseas Corporation to furnish pilotage for shifting the M/V HAR CANAAN on the occasion in question, but Bay-Houston Towing Company secured G. & H. Towing Company to furnish the chartered tugs to fulfill its contract as it had a right to do under that contract. G. & H. Towing Company likewise supplied petitioner to act as pilot. Of course petitioner therefore was the agent of Bay-Houston Towing Company, "borrowed" from his general employer G. & H. Towing Company, and was expressly within the terms of the pilotage exemption clause.

Dropping the Anchor Was an Act of Pilotage

It is certainly clear that dropping the ship's anchor cannot rightfully be deemed an act of towage. It was clearly

an act in the navigation and management of the vessel, accomplished by the ship's crew on the command of the ship's master and at the suggestion, advice, or order of the ship's pilot on the bridge.

The towing tugs obviously had nothing to do with the dropping of the anchor, as is clearly demonstrated by the fact that the District Court dismissed the libel as to them and their owners and absolved them from liability.

Decided cases likewise hold that the dropping of a ship's anchor is an act in the management of a vessel. Please see *The Etona*, S.D. N.Y., 64 F. 880, affirmed 2 Cir., 71 F. 895, and *Luria Bros. & Co., Inc. v. Eastern Transp. Co.*, 2 Cir., 1937, 89 F. 2d 900, both Harter Act cases.

And finally, petitioner Gray has been held by both Courts below to the high standard of care required of pilots, he was sent aboard the vessel as pilot and acted under his government license of pilot, and the District Court held him as pilot and held the vessel *in rem* "for the negligence of Captain Gray as pilot." The contract of course called him a pilot.

Pilotage Exemption Clauses Are Valid

Petitioner believes that there have been no previously decided cases in which the applicability of a like pilotage clause has been directly at issue that have held such a clause invalid. The decided cases have so uniformly upheld the validity of such clauses that Mr. Justice Frankfurter in his dissenting opinion in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, at 98, *et seq.*, was able to assert on a review of the authorities that *all* exemption clauses in towing contracts had theretofore been found to be valid.

The decision in *Bisso v. Inland Waterways Corporation*,

at page 92, clearly holds pilotage exculpatory clauses valid, citing *Sun Oil Company v. Dalzell Towing Co.*, in the following language:

> "It is contended that the towage contract rule we have accepted was rejected by this Court in Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311. We disagree. Unlike the Steamer Syracuse, The Wash Gray and the instant case, Sun Oil did not involve a contract designed to relieve a towboat owner from liability for negligent towage. The contractual clause there involved related only to pilotage. The clause provided that a tug captain who piloted a vessel propelled on its own power should be considered the servant of that vessel and that the tug owners should not be liable for his negligent pilotage. Sun Oil construed this contract as relieving the tugboat owners from all liability for negligence of the tug captain while piloting Sun Oil's vessel and held the contract valid as thus construed. But both the Court of Appeals and this Court recognized that holding the pilotage contract valid did not conflict with The Steamer Syracuse or The Wash Gray. Indeed, this Court expressly stated that the Sun Oil decree was 'not in conflict with the decisions' in The Steamer Syracuse and The Wash Gray. It is of course possible that the Court found an absence of conflict in the cases because of a different construction given the different contracts involved. We doubt this, but however this may be there are more basic differences upon which we prefer to rest this Court's statement that Sun Oil did not conflict with the two prior cases.
>
> "There are distinctions between a pilotage and a towage exemption clause which make it entirely reasonable to hold one valid and the other invalid. A pilotage clause exempts for the negligence of pilots

only; a towage clause exempts from all negligence of all towage employees. Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties. When the law does not prescribe their duties, pilots are usually free to act on their own best judgment while engaged in piloting a vessel. Because of these differences between pilots and towage employees generally, contracts stipulating against a pilot's negligence cannot be likened to contracts stipulating against towers' negligence. It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel on that vessel's own power. That was the Sun Oil case. It is quite a different thing, however to permit a towing company to exempt itself by contract from all liability for its own employees' negligent towage of a vessel. Thus, holding the pilotage contract valid in the Sun Oil case in no way conflicts with the rule against permitting towers by contract wholly to escape liability for their own negligent towing."

Petitioner respectfully submits that your Honors affirmed this validity on the same day in the following portion of your decision in *United States v. Chris Neilson*, 349 U.S. 129, 130:

" . . . We granted certiorari to consider the meaning and validity of the pilotage clause, 348 U.S. 811, 75 S. Ct. 59, and at the same time granted certiorari in two other cases, today decided, which involve validity of contracts exempting towers from liability for negligent towage. Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S. Ct. 629; Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 75 S. Ct. 649.

"(Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311, involved the meaning and validity of a pilotage contract substantially the same as the one here. One of Dalzell's tug captains negligently piloted Sun Oil's vessel causing the boat to ground and suffer damages. Sun Oil sued Dalzell. The contract exempting Dalzell from liability for pilotage was pleaded as a defense. This Court held that the tug company could validly contract against being 'liable for any damage' caused by the negligence of one of its captains in piloting Sun Oil's vessel and construed the contract there as having that effect. . . ."

That petitioner's reading of these decisions is correct is further established, it is respectfully submitted, by the decisions in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209.

Petitioner therefore respectfully submits that the Court below is clearly in error in its interpretation of *Bisso v. Inland Waterways Corporation*, *Sun Oil Company v. Dalzell Towing Co.*, and *United States v. Chris Neilson*, and that its decision is clearly in conflict with the two last cited cases decided by the Courts of Appeal for the Ninth and Second Circuits.

No Circumstances Here Justify Denying Validity to the Pilotage Clause

The trial Court found that public policy required the pilotage clause to be denied validity because under the monopolistic situation prevailing in the port of Galveston a vessel had no freedom of choice in the type of towing contract offered and must accept a contract with the exculpatory provisions to secure tug assistance.

While it is not admitted that where as here three separate owning companies charter their tugs to an operating company to secure efficient service there is any monopolistic situation, nevertheless the Court is in plain error in stating that a vessel had to agree to a contract with the exculpatory clause to secure tug assistance.

There is absolutely no evidence that vessels were under any requirement to sign the contract, as the operator of the M/V HAR CANAAN did here, in order to obtain tug assistance. As an examination of the contract shows, the inducement to sign it and agree to the contract is the ten per cent discount afforded those signing the contract. This was so testified to. R. 803. And please see Appendix IV, p. 52, and particularly the closing sentence of the offer, "All charges are net, *except when services are performed under contract*, then a discount of 10% is to apply on all tariff rates."

This clearly shows ships could secure tugs without having to sign the contract, and there is as stated no evidence to the contrary.

Further, none of the cases, which uniformly uphold the validity of pilotage clause exemptions, and which are from the great breadth of decisions found in harbor towing contracts in similar terms in practically all American ports,

have ever intimated that because towing services are not furnished by numerous companies the pilotage exemption is invalid. And in the exemption clause employed in the greatest American port, New York, the exemption is accorded from acts of the captains off the tugs, a much broader exemption than the one here of a licensed pilot, even though an employee of the towing company actually furnishing the tugs.

Nor does reason support this view why such a clause should be held invalid. Pilots are licensed by governmental authority and exercise independent judgment and are not subject to supervision and control, except on occasion by the master of the vessel. And why should an assisting tug be obligated to assume the ship's responsibility for the acts of the pilot? The ship is a common carrier, the towing tug not. If the towing tug diligently performs its towing duties, why should it be burdened with an added responsibility for the pilot?

The Court of Appeals did not base its decision holding the clause invalid upon the ground stated by the District Court, but instead preferred to affirm on the ground that petitioner was in fact not a pilot but simply one in charge of a dead-ship towing operation.

(Of course, its characterization of the *Dalzell* case as one of true pilotage by publicly licensed compulsory or involuntary pilots is manifest error; in that case the piloting was done by a captain from one of the assisting tugs, and the exculpatory clause was one stating a captain off a tug became an employee of the vessel being assisted.)

Since the exculpatory clause generally used in New York, and held valid in *Sun Oil Company v. Dalzell Towing Co.*, deals with a tug captain and not a pilot, as do many such

clauses held valid, the reason given by the Court of Appeals is without support in the adjudicated cases.

Its description of the facts here is in error also, it is submitted with all respect: the *contract*, which cannot rightfully be ignored as the Court apparently does, nowhere provides that a complete towing service was to be provided the ship. The contract provided only for tug power, which was furnished, and entirely independently had a clause agreeing in Galveston harbor to provide a pilot on request where the vessel was to be shifted without motive power.

And of course, finally, the acts of negligence charged in this case were acts of *pilotage*, not towage, and the *Bisso* case reference is in error also.

Petitioner respectfully submits, therefore, that the Court of Appeals is in clear error in denying the validity of the pilotage clause under the circumstances of this case, and that he is by such clause in accordance with the settled law enforced in *Moran Towing & Transp. Co. v. Nav. Lib. Triestina*, 2 Cir., 1937, 92 F. 2d 37, 1937 A.M.C. 981, cert. den. 302 U.S. 744, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, entitled to be indemnified by the M/V HAR CANAAN and its operator Maritime Overseas Corporation from any liability to respondents the pipe line owners.

II.

It is not in dispute and the District Court has expressly found that the prominent signs which were placed on Pier 41 and across the harbor purporting to mark the location of the lines with the words "Warning Pipe Crossing Do

Not Drop Anchor" were actually thirty-one feet east of the two pipe lines at the Pier 41 end and one hundred fifteen feet east across the harbor on the Pelican Island end of the lines. The true location of the lines was therefore not marked by the signs, and the signs provided misleading information.

Since the vessel approaching from the east dropped her anchor on the westernmost of the two pipe lines, and there was no evidence that the easternmost line (which had never been previously found at any time to be more than ten feet from the western line) was touched or damaged by the anchor, it obviously follows without room for a contrary contention that had the lines actually lain between the warning signs neither would have been struck by the anchor.

Petitioner Gray testified that he knew from general knowledge that pipe lines were being worked on near Pier 41 but had not piloted vessels near there before this occasion and that he told the master when to drop the anchor in reliance upon the prominent signs warning of the position of the pipe lines.

The master of the M/V HAR CANAAN testified that after being told by petitioner to drop the anchor he asked petitioner Gray whether "we are clear of the signs" and on receiving an affirmative reply did not order the ship's crew to drop the anchor until he had himself checked the warning signs to make sure the anchor would fall clear. R. 681-683.

Somewhat contradictorily the District Court held that Captain Gray should have been aware of the "presence" of the lines from the prominent warning signs but was not misled by the position of the warning signs.

The Court of Appeals held that while the District Court could have held the pipe line owners at fault for not marking more precisely the position of the lines, it was not clearly erroneous not to have done so. It then held it was proper to hold Gray at fault (and thus solely at fault) for failure "to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines" he dropped the anchor on them.

Petitioner respectfully submits the standard of care thus imposed by the Court of Appeals is to make of him as pilot an insurer. He is not being held to ordinary care in attempting to learn of or to know the location of the pipe lines. His duty as held by the Court of Appeals is absolute: at his peril he must ascertain the *precise* location of the pipe lines, by taking soundings or by using other "adequate precautions."

There can be no doubt that since the decision of this Court in *Atlee v. Packet Company*, 21 Wall. 389, the standard of care imposed upon a pilot requiring him to acquaint himself with navigational objects or obstructions is a high one. But petitioner respectfully submits that a pilot is not an insurer and has never been held one, so that his lack of knowledge would absolve another from the effects of its own negligence, and that the decisions of the Courts below impose such a duty upon him without justification in law.

The trial Court has found on undisputed evidence that the warning signs did not show the location of the struck pipe lines. The undisputed evidence establishes that not only the petitioner (contrary to the trial Court's conclusion) but also the master of the vessel in dropping the

anchor relied upon the warning signs as marking the location of the lines.

In absolving the pipe line owners from fault by imposing the absolute duty of knowledge on petitioner the decision of the Court below is clearly in conflict with the decisions of other Courts of Appeal in *The Georgic*, 9 Cir., 14 F. 2d 98, and *The Steam Dredge No. 6*, 2 Cir., 241 F. 69, cert. den. sub. nom., *Standard Gas Light Co. v. Packard Co.*, 244 U.S. 659, in both of which cases the vessels were held not liable even for half damages, and contrary also to a carefully considered recent decision of the District Court of Massachusetts, *Essex County Electric Co. v. M/V Godafoss*, D.C. Mass., 1955, 129 F. Supp. 657, in which the pilot's lack of knowledge of the location of the cable in navigable waters was held not to insulate the other party from its duty to mark properly the obstruction, both parties being held at fault.

III.

Petitioner further urges with all respect that the Court of Appeals is in clear error also in affirming (without discussion) the trial Court's holding that he indemnify the vessel from its *in rem* liability.

The vessel, though without motive power, had a full crew aboard and during the entire time of the operation was in command of her master. The master approved in advance before the ship left the dock the use of the anchor, and when petitioner Gray told the master it was time to drop the anchor, the master did not order the anchor dropped until he had himself checked the position of the ship vis-a-vis the warning signs and only after having done so told the third officer to transmit to the chief officer and

crew at the anchor the order to drop the anchor. R. 681-683. Nor did petitioner represent to the master that he had any other knowledge of the location of the pipe lines than what was available also to the master: he did nothing more than point out the signs when the master questioned him. R. 683.

The Court of Appeals' decision plainly is based upon a holding that petitioner was *not* a compulsorily employed pilot; in fact, the Court while holding petitioner to standards of knowledge even higher than those required of pilots holds he was actually little more than a tug master. There can be no doubt that petitioner, though acting as pilot, was *not* an involuntary or compulsory pilot, but instead one voluntarily engaged for the convenience of the ship.

The matter is carefully discussed in *Robinson on Admiralty*, pp. 688, 693, and the history and effect of Congressional enactments relating to pilots and classes of vessels is set forth in *Anderson v. Pacific Steamship Co.*, 225 U.S. 187, and *Huus v. N. Y. & Porto Rico Steamship Co.*, 182 U.S. 392. As the latter case shows, Congress has left to the states whether to require vessels engaged in *foreign commerce* (as was of course this ship here) to take pilots. This is particularly clear from Section 211 of Title 46, *United States Code*, reading as follows:

> "46 U.S.C. 211. State regulation of pilots
>
> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose. R.S., Sec. 4235."

The statutes of Texas require a vessel engaged in foreign trade to engage a pilot *only* on entering or leaving port. Please see Article 8274, *R. C. S., Texas*, 1925, quoted in Appendix VI below.

It is of course to be noted that Captain Gray held no Texas state appointment and was *not* a branch pilot for Galveston Bay waters.

It is therefore completely clear that the M/V HAR CANAAN had no obligation at law to secure a pilot at all to make the intra-harbor shift. If he had desired to pilot and navigate his ship without outside help, just as he would at sea, the master had a perfect right to do so.

Proceeding further and turning from the law to the facts of the instant case, the vessel's operator Maritime Overseas Corporation, and of course the master of the vessel, were under no *contractual* obligation when they desired or needed to employ tugs to engage any dead-ship pilot to assist in shifting the vessel. While the agreed contract provides that Maritime Overseas Corporation would engage all its *tug power* from Bay-Houston Towing Company, *nowhere in the agreement* is there any provision that it could not obtain as many tugs or as much tug power as it thought it needed without requesting a dead-ship pilot to assist the master in shifting the ship. It could employ any pilot anywhere available as it might desire. The contract of course provided that the tug company (whose business was providing *tug power*, not providing pilots) would have no responsibility of any kind for the acts of *any* pilot. The agreement is not restricted to any employees of the towing companies who might have pilot's licenses, but covers *any pilot*, whether usually employed by the tug company or not.

Petitioner respectfully submits, therefore, that the Courts below are in clear error in requiring him to indemnify the vessel's liability, because he was a subordinate of the master and subject to his orders and the master actively was a party to the dropping of the anchor and at law certainly equally responsible with petitioner if not entirely responsible for the consequences of such action.

Cases hardly need be cited to show that here where the pilot was voluntarily engaged to assist him the master did not relinquish his command or responsibility. *Ralli v. Troop*, 157 U.S. 386, *The Oregon*, 158 U.S. 186. The vessel and its operators are of course in such circumstances responsible. *Sherlock v. Alling*, 93 U.S. 99; and please see the discussion in *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406.

Petitioner therefore respectfully urges that to free the vessel and its operator from liability by requiring him to indemnify the vessel against its *in rem* liability is plainly contrary to these cases and to the recent case of *Halcyon Lines v. Haenn Ship Co.*, 342 U.S. 282, where your Honors have expressly held that there is no liability in admiralty between joint tortfeasors. Plainly, the master was equally if not wholly responsible here. Indemnity is of course merely an "extreme form of contribution," as has been pointed out by Judge Learned Hand in *Slattery v. Marra Bros., Inc.*, 186 F. 2d 134.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that this petition for writ of certiorari be granted and that the judgment of the Court of Appeals be reversed in whole and the petitioner freed from liability and indemnified

from any liability by the vessel, or reversed in part and the liability of the respondent pipe line owners for half-damages decreed, and petitioner be held not required to indemnify the claimant of the M/V HAR CANAAN, and such claimant be held liable for a proportionate part of any damages.

Respectfully submitted,

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition for writ of certiorari was made upon McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, attorneys for respondents, and Lustham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, attorneys for respondent Maritime Overseas Corporation, claimant of the M/V HAR CANAAN, by mailing copy of the same to them at their addresses shown, this day of July, A. D. 1961.

ROBERT EIKEL

APPENDIX I.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18619

EMMETT GRAY, G & H TOWING COMPANY and MARITIME OVERSEAS CORPORATION,

Appellants,

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(March 15, 1961.)

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

HUTCHESON, Circuit Judge: This appeal is from findings and a judgment in admiralty in favor of the libellants, in a suit brought by them as owners of pipe lines, for damages resulting from their negligent destruction in the course of shifting the M/V Har Canaan as a dead ship to a slip in Galveston Harbor.

A great deal of testimony was taken on the issue of fault, and the district judge made full findings in effect that the destruction of the pipe lines was due to the negligence of the respondent, Emmett Gray, port captain for G & H Towing Co., who was furnished by it as a pilot for the dead ship movement.

Based on these findings, the court adjudged: (1) Gray liable; (2) the Har Canaan liable in rem; (3) Maritime Overseas, owner of the Har Canaan, not liable in personam; and (4) G & H Towing Co., the employer and furnisher for the movement of Emmett Gray, its port captain liable in personam. He also denied and awarded indemnity as follows:

> "Thus, as to the liability over between the several respondents, the following conclusions are made.
>
> "6. G & H Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the Har Canaan, for any payment they may be required to make under the decree to be entered herein.
>
> "7. Maritime Overseas Corporation, as claimant of the Har Canaan, is entitled to indemnity from Captain Emmett Gray, individually, and from G & H Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G & H Towing Company to Maritime Overseas will be joint and several."

Gray, as the respondent held primarily liable, here insisting that the findings and conclusions, that he was negligent in handling the ship so as to cause injury to the pipe lines, are clearly erroneous, launches massive attacks upon the findings, that he was negligent, and urges upon

us that the cause of the injury to the pipe lines was negligence not on his part but on the part of the pipe line owners in not properly laying and maintaining the lines in place and in not clearly and properly marking their location.

The other appellants join him in this attack and argue mightily that the district judge has misconceived what actually occurred and that the findings of negligence are against the truth and right of the case.

The G & H Towing Company, in addition to its attack upon the negligence findings of the court, strongly attacks the court's conclusion, that the clause in its contract providing in effect that it would not be liable for the acts of pilots furnished by it would not avail it, as an erroneous conclusion of law, and urges that, because of that clause, Gray's negligence would not be imputed to it, and it could not, therefore, be held liable for it.

The Har Canaan and Maritime Overseas Corporation, its owner, argue vigorously that they were not responsible and cannot be held liable for the negligence of the pilot. Each of these argue that the conclusions on idemnity are wrong.

For the reasons hereafter stated, we are of the opinion: that the district judge was right throughout in his findings of fact and in his conclusions of law, that Gray was guilty of negligence in causing the anchor to be dropped upon the pipe line, and that, as a result of his negligence, he and the other respondents found liable are liable to the pipe line owners for the damage done them; and that the right of exoneration, action over, or indemnity is as he concluded it to be.

Taking up first the primary question of whether the findings of fact as to fault should be set aside, we think

it sufficient to briefly say that the matter of fault or negligence is a disputed issue, and that, on the record as a whole, there was ample evidence for the district judge to find, as he did: that Gray and, therefore, the Har Canaan and its owners, and the G & H Towing Company knew that the pipe lines were laid in the slip under permit; that the burden was heavily upon them to show, in defense of their act in dropping the anchor, that they had made proper inquiries as to just where they were laid; and that due care had been used in dropping the anchor to avoid striking and injuring them in the course of the ship's movement; that, in short, Gray and the other respondents could not shift liability for the affirmative acts causing injury to the pipe line as a result of dropping the anchor on the lines by complaining here that, as matter of law, the pipe line owners were at fault in not marking more precisely the position of the lines, or that the findings that they were not are clearly erroneous.

In declaring these views, we are not holding that the district judge could not have found the fault and responsibility as these contend he should have. We are holding, though, that it was entirely proper for the district judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was the failure of Gray to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines, he dropped the anchor on them with damaging results.

With the highly important question of primary fault for the injury thus disposed of by our holding that the court's findings as to Gray's negligence are not clearly erroneous and must be approved, we turn to the other questions raised by the several appellants.

The first of these is the complaint of all the appellants, including Gray that the district judge erred in refusing to give effect to the pilotage clause[1] in the towing contract, providing in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, its employee, indeed its port captain.

Of this, we think it sufficient to say that we agree with the district judge's conclusion that the libellants, strangers to the contract, cannot, of course, be held bound, or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that appellants are bound and precluded by the decision and holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, that such a clause is invalid. In addition, we think it clear that respondents' reliance on *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, will not at all do there, both because of the decision in the Bisso case, which, on full consideration, rejected the Dalzell case as authority for the position here taken, and because the Dalzell case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in the case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation

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[1] "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel, or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for (sic) any act, omission or order of said pilot."

who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the Bisso case, and the judgment denying effect to the invoked clause of the contract must be affirmed.

We are also of the opinion that there is no merit whatever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid. Neither is there any merit in the claim of Maritime Overseas Corporation and Har Canaan, that they are not liable for Gray's acts because, under the law governing pilotage, they could not be held liable for the pilot's negligence. We find nothing in the cases cited by them, nothing in the cases generally, which supports this claim. Indeed, we think the cases have settled the law to the contrary, even in a case of true involuntary or compulsory pilotage. Cf. *Publicker Industries, Inc. v. Tug Boat "Neptune" Company et al*, 171 F(2) 48; *United States v. Chris Nielson*, 349 U.S. 129. We are, therefore, of the clear opinion that the court's findings of fact as to fault in the injury to the pipe lines cannot be set aside as clearly erroneous; that his conclusions, that the respondents held liable were in fact and in law responsible to the libelants, are correct and may not be set aside; and that all questions as to actions over for exoneration and/or indemnity were correctly decided, and the decree is in all things AFFIRMED.

APPENDIX II

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This proceeding is brought in rem against the Israeli vessel HAR CANAAN, claimed by Maritime Overseas Corporation; in rem against the Tug J. R. GUYTON, owned by Bay-Houston Towing Company; in rem against the Tugs JUNO and ALBATROSS, owned by Suderman & Young Towing Company; and in personam against Bay-Houston Towing Company; Suderman & Young Towing Company, and G. & H. Towing Company, the charterer and operator of the three tugs named, and Emmett Gray, an individual, employed as Port Captain by G. & H. Towing Company. The Libellants are Pelican Island Development Corporation, the owner of the pipeline work which was damaged in this casualty; Merritt-Chapman & Scott Corporation, general construction contractor for the Pelican Corporation; Edwin E. Johansson, sub-contractor under Merritt-Chapman & Scott for construction of water and sewer pipelines between Galveston Island and Pelican Island; and Kansas City Bridge Company, sub-contractor under Johansson for the cross channel portion of this construction which was immediately involved. By impleading petition of cross-libel, Maritime Overseas Corporation asks indemnification from the Tugs J. R. GUYTON, JUNO, and ALBATROSS, and from all the named respondents, for any recovery libellants may obtain against the HAR CANAAN or her claimant, and by impleading petition or cross-libel, those same respondents jointly and severally ask indemnification from Maritime Overseas Corporation for any recovery libellants may obtain against them.

A trial having been had on the issues of liability alone, and having received and considered the evidence and the briefs and arguments of the proctors for the respective parties, these Findings and Conclusions are made by me pursuant to Admiralty Rule 46½.

FINDINGS OF FACT

1. The channel between Galveston Island and Pelican Island is a part of the Galveston harbor. Slip A is immediately west of Pier 41 on the Galveston Island or southerly side of this channel. The width of the channel at this point is approximately 1400 feet, and the channel at this point is dredged to a depth of approximately 35 feet between the harbor lines, a distance of 1125 feet.

2. On April 12, 1956, a permit was issued to libellants through the office of the United States Corps of Engineers for the construction of water and sewer mains, each approximately 12 inches in diameter, to be laid in a trench across the Galveston channel, and at a depth not less than 50 feet below mean low water. By amendment of the permit on December 16, 1957, the center line for this crossing, at the southerly or Galveston Island end, was established at a point which the evidence shows to be approximately 18 feet eastward from the northeast corner of Slip A, and the line of bearing for the crossing from that point was N 10° 23' 25", or almost directly across the channel to a point opposite on Pelican Island.

3. Acting under this permit, as originally issued and so amended, Merritt-Chapman, as general contractor for the Pelican Corporation, contracted with Johansson for the construction of these pipelines, and Johansson in turn subcontracted to Kansas City Bridge Company that part of the work which involved laying the sub-aqueous lines. A

trench was dredged across the channel to the necessary depth of 51½ feet, which was approximately 16 feet deeper than the normal depth of the channel between the harbor lines. The dredged trench followed the center line of the crossing as established by the amended permit, and extended about 50 feet to either side of that centerline. This portion of the work was completed prior to November 27, 1957, and soundings of the trench were made by the United States Corps of Engineers on that date. Late in 1957, Kansas City Bridge Company began receiving sections of the steel pipe to be laid at a job site at the Pelican Island end of the crossing, and for sometime thereafter was engaged in welding st. .t sections of this pipe into 400 foot lengths, testing the welds, and covering this pipe with a protective wrapping. Meanwhile, in December, 1957, and January, 1958, a large "whirley" or crane barge was used to dredge the ends of the trench, outside of the harbor lines. A cavein of the bulkhead at the northeast corner of Slip A, caused by this dredging, was repaired in December, 1957. In January, 1958, a bulldozer was used to cut a 400 foot ditch on Pelican Island into which the long sections of pipe could be placed preparatory to their being drawn into the water.

4. On January 27, 1958, pulling cables were stretched across the channel, and the leading section of each pipeline was hung below a barge at the Pelican Island end. On the ensuing four days, the two pipelines were drawn behind this barge and laid in the trench across the channel which had been dug to receive them. On January 31, 1958, the channel was cleared again for marine traffic. Between February 6 and February 25, 1958, the whirley barge was employed as riser sections were welded to the two pipelines, first at the Galveston Island end, then the Pelican Island end. Between February 27 and March 4, 1958, divers

were used to walk the pipelines and ascertain their position and alignment. The whirley barge was used to uncross the lines at one point in mid-channel during this work. On March 5, the lines were filled with water for hydrostatic pressure tests, and they remained filled with water until the later casualty.

5. The remaining work on the pipelines prior to the casualty in suit, which occurred on March 21, 1958, was concerned with the construction of a thrust block over the risers at the Galveston Island end, just east of the entrance to Slip A, and immediately in front of the bulkhead between Slip A and Pier 41. Sleeves were welded around the risers where they passed through the bulkhead, a wooden form was constructed for the thrust-block, and this was lowered into place over the risers after the ground had been cleared by a diver. On the morning of March 21, and at the time of the casualty, concrete was being poured for this thrust-block. A diver was then below directing this work, and his tenders were on the deck of the whirley barge which lay at the northeasterly corner of Slip A, and partly into that Slip. The crane of the whirley barge extended over the work area. On the channel side of the bulkhead, a small "sea mule" and a larger flat barge were immediately above and adjacent to the work area, and personnel employed by Kansas City Bridge Company were on these work boats as well as upon the bulkhead.

6. In addition to the physical evidence already related showing the construction and placement of these pipelines across the channel, and to the notice thereof contained in the permit issued by the United States Corps of Engineers, at least three "Notices to Mariners" had been issued by the Corps of Engineers, on November 15, 1957, December 23, 1957, and January 16, 1958, advising of this construc-

tion. On December 30, 1957, double signboards, measuring 7 feet 10 inches, by 16 feet, on each face, and bearing large letters reading "WARNING--PIPE CROSSING—DO NOT DRAG ANCHOR" were placed on either side of the channel, the sign on the Galveston side being centered about 31 feet east of the center line established for the crossing, and the sign on the Pelican side being centered about 115 feet east of this center line. The legend of either sign was easily visible to any ship proceeding up or down the channel.

7. The Israeli ship HAR CANAAN is a dry-cargo vessel of 10,311 gross tons. Her length is 515 feet 2 inches, and her beam is 66 feet 7 inches. She carried two anchors forward, each weighing approximately 8900 pounds. At the time of this casualty the ship was light and drawing approximately 10 feet. Her forecastle deck was approximately 40 feet above the water line, her bridge deck was approximately 60 feet above the water line, and the horizontal distance from the hawse-pipes in the bow of the ship to the bridge was about 200 feet.

8. On the morning of March 21, 1958, the HAR CANAAN was fully manned, equipped and seaworthy excepting that her main engines were shut down for repairs. Her agents at Galveston, Strachan Shipping Company, gave an order to Bay-Houston Towing Company to furnish three tugs and a pilot to move the HAR CANAAN as a "dead" ship from Pier 15, where she was then lying, to Sunset Grain Elevator at the inner end of Slip A. The distance between these points was approximately two miles.

9. Bay-Houston Towing Company held a contract with Maritime Overseas Corporation, operator of the HAR CANAAN, to move its vessel on stated rates and terms.

10. The only towing companies offering tug service for shifting ocean going vessels in the port of Galveston at the time in question were Bay-Houston Towing Company, Suderman & Young Towing Company, and Intracoastal Towing & Transporation Company. Each of these companies owned a number of harbor tugs. These three "owning companies" competed with one another in the sense that they solicited their own business, made their own contracts, and invoiced the towed vessels for the service performed. However, the services which were available to the owners and operators of ocean going vessels in the port of Galveston from the three "owning companies" were identical. This comes about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G. & H. Towing Company, an operating Company, which was owned jointly by the three "owning companies". In carrying out the orders for towing service, G. &. H. Towing Company would use the tugs which were most readily available and convenient, without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed. The contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner. The contracts offered by the three "owning companies" (their owners or charterers) were identical in terms, and upon a single printed form. The rates too were the same, save for an exclusive contract a ten percent (10%) reduction was allowed. The contract with Maritime Overseas was of this nature, and carried the ten percent (10%) discount.

11. Among the other provisions of this contract, to which reference is made for all purposes, was the following

provision, which by reason of its significance is quoted here:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect to all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

12. Captain Emmett Gray, one of the respondents, is full time and salaried employee of G. & H. Towing Company. Prior to March 1, 1958, he had served for several years as night dispatcher for G. & H., and on that date he became Port Captain for G. & H., and was placed in full charge of the dispatching office. Since 1932, he has held an unlimited pilot's license covering Galveston harbor, as well as other adjacent waters. As Port Captain for G. & H., he was the "dead ship" pilot assigned by his employer for all shifting of dead ships within Galveston harbor when the tugs operated by G. & H. were employed. Out of the fixed charge made for shifting a vessel without her power, Captain Gray received a percentage of this charge (in addition to his salary from G. & H.), with the balance of the charge going to the company owning the contract (one of the three "owning companies"), and G. & H. as the operating company. In this regard, it should be noted that Captain Gray's duties with G. & H. did not contemplate,

nor did he accept, employment as a harbor or branch pilot (meeting incoming vessels at the sea buoy, and bringing them, usually under their own power, into Galveston harbor, with converse service for out going vessels.)

13. On the morning of March 21, 1958, Captain Gray boarded the HAR CANAAN as she lay at Pier 15, and assumed the conning of the vessel. He informed her Master of his intention to use the port anchor in turning the ship into Slip A, and the First Mate of the HAR CANAAN, with a deck crew, was stationed in her bow and the anchor made ready for use on orders from the bridge. Thereupon, the HAR CANAAN was moved westerly down the channel toward Slip A, with the Tugs JUNO, ALBATROSS, and J. R. GUYTON, made up alongside and providing the only motive and directional power for the vessel under orders given directly to them by Captain Gray from the bridge of the HAR CANAAN. The Master of the HAR CANAAN was also upon the bridge of his vessel at all times during the maneuver, and he relayed to the First Officer in the bow and the crew orders as received from Captain Gray during the maneuver, including the order to let go the port anchor. The helm of the HAR CANAAN was lashed, as her propelling machinery was shut down, and she had no steerageway of her own.

14. Shortly after noon, as the HAR CANAAN reached the vicinity of Pier 41, she was navigated by the tugs at an angle from the center of the channel toward the opening of Slip A. Captain Gray then ordered the port anchor to be dropped, with one shot of chain, and this order was promptly executed. Subsequently, the bow of the ship, with anchor down, continued to move toward the northeast corner of Slip A and came within about 10 feet of contact with the whirley barge in that position before the anchor was heaved in some five minutes later. Almost im-

mediately after the anchor was dropped, violent movements of the sewer pipe, which was westerly of the two pipes being laid, were perceptible to the workmen on shore as well as to the diver working underwater. Sounds such as would have been caused by the breaking of the pipeline were also heard by the workmen on shore when the anchor of the HAR CANAAN was heaved in. Subsequent investigations did show that the sewer line was badly bent or broken, but still in the trench, at a point approximately 250 feet out in the channel, and was completely broken at a point only 90 feet from the bulkhead, with the ends of the pipe at this point pulled out of the trench and lying in front of the opening to Slip A.

15. Immediately prior to the arrival of the HAR CANAAN at Slip A on the 21st of March, 1958, the water and sewer lines were being constructed by libellants in accordance with the permit duly issued for that purpose, and these two pipelines were properly situated at the depth and in the position prescribed in such permit, as amended December 16, 1957.

16. The port anchor of the HAR CANAAN was dropped on, or dragged over, one, or perhaps both of said lines, on March 21, 1958, breaking the sewer line, the more westerly of the two, and causing damages to each of the libellants in amounts to be determined.

17. Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipelines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible.

18. Captain Gray was not misled by the position of the warning signs, and was negligent in giving the order to drop the anchor without regard to the presence of the pipelines.

19. The tide was nearing the end of the ebb, and the wind was from the southeast at force three, although neither weather, wind nor tide were factors of any consequence in the handling of the HAR CANAAN at the time, and no emergency or necessity required that the anchor be dropped at the place where it was dropped.

20. Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times.

21. The Master of the HAR CANAAN was not negligent in failing to intervene, or displace, the pilot when the order to drop the anchor was issued by Captain Gray, because the situation was not one of obvious danger, and the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master.

22. Neither the Master nor crew of the HAR CANAAN was negligent, or at fault, in any particular.

23. The assisting tugs were properly maneuvered by their crews in accordance with orders given them, and were in no way at fault.

CONCLUSIONS OF LAW

1. Captain Emmett Gray is personally liable for his own acts of negligence.

2. G. & H. Towing Company is liable for the negligence of Captain Gray as its employee.

3. The HAR CANAAN is liable, *in rem*, for the negligence of Captain Gray as her pilot.

4. Libellants are entitled to recover their provable damages, as their interests may appear, from the HAR CANAAN, *in rem*, from G. & H. Towing Company, *in personam*, and from Emmett Gray, individually. The liability so decreed shall be joint and several.

5. Libellants are not entitled to recover from the tugs J. R. GUYTON, JUNO, or ALBATROSS, in rem, or from Bay-Houston Towing Company or Suderman & Young Towing Company, in personam.

The foregoing Conclusions dealing with the liability of the respondents to libellants, in my judgment, follow quite readily from the Findings of Fact set out above, and present no serious question of law.

The libellants obviously were not parties to the contract of towage between Maritime Overseas and Bay-Houston, and the liability of respondents to libellants has been determined without regard to the provisions of such contract.

In considering the question of liability over between the various respondents, however, the validity of the so-called "pilotage" clause (Finding No. 11) is placed in issue.

Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, and the related opinions immediately following. Respondents G. & H. and Captain Gray in supporting the validity of the exclupatory provisions rely primarily on *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor, whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an em-

ployee of the towing company, and such towing company did "have power to drive hard bargains."

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."; and (b) "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. . . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Thus, as to the liability over between the several respondents, the following Conclusions are made.

6. G. & H. Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the HAR CANAAN, for any payment they may be required to make under the decree to be entered herein.

7. Maritime Overseas Corporation, as claimant of the HAR CANAAN, is entitled to indemnity from Captain Emmett Gray, individually, and from G. & H. Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G. & H. Towing Company to Maritime Overseas will be joint and several.

The Clerk of the Court will furnish counsel of record a copy hereof.

Counsel will present appropriate order promptly.

Done at Houston, Texas, this 24th day of December, 1959.

BEN C. CONNALLY
United States District Judge

APPENDIX III

No. 18619

JUDGMENT

Extract from the Minutes of March 15, 1961

EMMETT GRAY, G. & H. TOWING COMPANY, and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN F. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Emmett Gray and G. & H. Towing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX IV

PERTINENT CONTRACT PROVISIONS

BAY-HOUSTON TOWING CO.

* * *

"The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

"The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

"Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

"Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

"This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

"All charges are net, except when services are performed under contract, then a discount of 10% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

"We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By_____"

(In the provisions covering Assisting Vessels, at Galveston-Texas City, but not under the provisions for services at other named ports, the contract had a provision "Pilotage-Shifting Vessels Without Own Power . . . . . 60.00")

APPENDIX V

TUGS:

C. R. HADEN
H. O. WEATHERBEE
J. R. GUYTON
JENNIFER GEORGE

LAURA HADEN
LUCY HADEN
R. T. McDOW
R. J. WALES

W. A. WANSLEY

[redacted] BARBARA GEORGE
J. HARRIS MASTERSON

TUG BOAT HARBOR TARIFF

EFFECTIVE APRIL 10, 1957

BAY-HOUSTON TOWING CO.

GALVESTON

504 National Hotel Bldg
Phone 5-9381
Pier 10 Wharf Phone 3-4673

Night Phones { 3-4673 5-7534 / 5-8542

HOUSTON

811 Cotton Exchange Building
Phone CApitol 2-6231
Dock Phone WAlnut 8-5406

Night Phones { JAckson 4-8835 / UNderwood 9-2701

CORPUS CHRISTI

Ore Dock
Phone: TUlip 4-8791 & TUlip 3-7843
Night Phone: 53 Ingleside

Gulf Coast Towing, Harbor Towing, Oil Lightering and Transportation

OIL BARGE IPB 201

CORRESPONDENCE AND WORK SOLICITED

B Tug Calls: _____ **(Long, Short, Long)**
H Tug Calls: _____ **(Long, Short, Long, Short)**

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

ASSISTING VESSELS

GALVESTON — TEXAS CITY

Docking or Off Docking, at Galveston, per tug	$180.00
Shifting, Dock to Dock, per tug	205.00
Off docking and to Bolivar Roads, per tug	230.00
Off docking and to Texas City and Docking, per tug	330.00
Bolivar Roads to Texas City or vice versa, per tug	230.00
Docking, Off Docking, or Shifting at Texas City, per tug	230.00
Towing vessels or ocean-going barges from Galveston Bar to Bolivar Roads, Texas City or Galveston Docks, per tug. Per hour or fractional part Running time chargeable.	105.00
Shifting derrick barges—Galveston Harbor	85.00
Galveston to Bolivar Roads	85.00
Galveston to Texas City	135.00
Pilotage—Shifting Vessels Without Own Power	60.00

SPECIAL SERVICES

Pulling on ships aground	
When tug is engaged in assisting vessel, one-half hour free pulling time, each succeeding hour or fractional part	$ 80.00
When Tug not engaged in assisting vessel: Per hour or fractional part Running time chargeable.	95.00
Furnishing and delivering water to ships at anchorage: Per Trip	200.00

IN TOWING VESSELS OR BARGES, TOWED VESSELS TO FURNISH HAWSERS.

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Galveston and $90.00 at Texas City will be made.

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $60.00 per hour, with one half hour free time allowed.

HOUSTON SHIP CHANNEL

BETWEEN	
Morgan's Point and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	$380.00
Morgan's Point and Baytown	230.00
Bolivar Roads and Morgan's Point or Baytown	430.00
Bolivar Roads and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	455.00
Galveston and Baytown	440.00
Texas City and Baytown	440.00
Houston and Norsworthy, Crown, Galena or Sinco	240.00
Houston and Todd Shipyards, Port Adams, Sheffield, Shell or Ordnance Depot	330.00
Galveston and Houston	580.00
Bolivar Roads and Houston	580.00
Texas City and Houston	580.00
Morgan's Point and Houston	430.00
Houston and Baytown	405.00
Baytown and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	380.00

(Norsworthy, Crown, Galena, Sinco, Clinton, Manchester take same rates as Houston from above points.)
Above charges including Docking or Off Docking.

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

HOUSTON SHIP CHANNEL
DOCKING AND OFF DOCKING

Docking or Off Docking at all points between Manchester Terminal and Turning Basin, both inclusive	$180.00
Docking or Off Docking at points below Manchester to Norsworthy, inclusive	195.00
Docking or Off Docking at points below Norsworthy to Ordnance Depot, inclusive	240.00
Docking or Off Docking at Baytown	230.00

SHIFTING

Shifting vessels between docks at Manchester Terminal and Turning Basin, both inclusive, per tug	$205.00
Shifting vessels between points below Manchester to Norsworthy, inclusive, per tug	270.00
Shifting vessels from one point to another on the same dock between points below Norsworthy to Ordnance Depot, inclusive	290.00
Shifting vessels between points below Norsworthy to Shell, inclusive, per tug	330.00
Shifting from one berth to another at Baytown	230.00

MISCELLANEOUS SERVICES

Pulling on ships aground
- When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part — 80.00
- When tug is not engaged in assisting vessel, per hour or fractional part — 95.00
  - Running time chargeable

The above rates to apply for a single tug
- Tugs ordered to stand by but not put to work will be charged for the same as if pulling

Rates for towing dead ships between points on Houston Ship Channel, other than above specified, will be charged for on "pulling time basis."
All towed vessels to furnish towing hawsers
Hoking vessels off dock and redocking, shifting rates to apply
Standing by or holding vessel in stream or alongside bank waiting for berth, pulling time rate will apply
When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charge of $60.00 will be made

Furnishing and delivering water to ships, Per Trip	200.00

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $60.00 per hour, with one-half hour free time allowed

PORT ARANSAS — CORPUS CHRISTI

Docking, off docking or shifting at Harbor Island	$280.00
Assisting between Harbor Island and Corpus Christi	430.00
Sea to Ingleside	380.00
To dock at Ingleside:	
When tug is at Ingleside	290.00
When tug is not at Ingleside	380.00
Assisting between Ingleside and Harbor Island	380.00
Assisting between Ingleside and Corpus Christi	380.00
Sea to Corpus Christi and dock	430.00
From outside bridge at Corpus Christi and to dock at Turning Basin wharves	210.00
To dock at wharves in Corpus Christi Turning Basin	180.00
Shifting in Corpus Christi Turning Basin	205.00
Sea to Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
Docking or undocking at the Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
From outside bridge to all points between Sunray Dock and Oil Docks 3 & 4, inclusive	230.00
From Turning Basin inside the bridge to above docks	220.00
To docking or off docking at above docks	220.00
To shifting between above docks or between above docks and docks in Corpus Christi Turning Basin	220.00

Pulling on ships aground
- When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part — 80.00
- When tug is not engaged in assisting vessel, per hour or fractional part — 95.00
  - Running time chargeable

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Corpus Christi and Harbor Island, and $80.00 at Ingleside, will be made
The above rates to apply for a single tug

Detention - One half hour free time, thereafter, per hour	60.00
Furnishing and delivering water to ships at Harbor Island, Ingleside, or Corpus Christi, Per Trip	200.00

OVERTIME RATE

20% will be added to the tariff rates for all work performed between the hours of 5 P.M. and 7 A.M., also for work performed on Sundays and Holidays and Mondays following Holidays.
Overtime Rate to apply when service is started and or completed in an overtime hour.
Starting time will be the time Tug leaves berth and time of completion will be the time Tug returns to berth.

FORCE MAJEURE

Neither party shall be responsible for delays, failures or omission hereunder due to strikes, lockouts, labor disturbances, riots, fire, earthquakes, storm, lightning, epidemics, war disorders, acts of God, etc.

The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

All charges are net, except when services are performed under contract, then a discount of 10% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By _____

APPENDIX VI

Article 8274, R.C.S. Texas 1925. Pilotage

"The rate of pilotage, which may be fixed under Articles 8267 and 8269, on any class of vessels shall not, in any port of this State, exceed Five ($5.00) Dollars for each foot of water which the vessel at the time of piloting draws; and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot whose services she so declined for the payment of half pilotage; and any vessel which, after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or if she has come in without the aid of a pilot, though offered outside, she shall on so going out be liable for the payment of half pilotage to the pilot who had first offered his services before she came in; but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. At any port where vessels shall receive or discharge their cargoes at an anchorage outside of the bar, such vessel shall be liable to pilotage at the above rate to such anchorage, but shall not be liable for or compelled to pay pilotage from such anchorage to the open seas; and if any vessel bound from open sea to such anchorage, while under way, shall decline the services of a pilot, and shall afterward receive or discharge any portion of her cargo at such anchorage on the lighters or otherwise, she shall be liable for the payment of half pilotage at the above rate to such anchorage to the

first pilot whose services shall have been tendered to and declined by her, but not liable for any pilotage from such anchorage to the open sea; and when a pilot takes charge of a vessel twenty miles outside of the bar, and brings her to it, he shall be entitled to one-fourth pilotage for such off-shore service, in addition to what he is entitled to recover for bringing her in, but if such off-shore services be declined, no portion of said compensation shall be recovered. Acts 1866, pp. 14, 15; G.L. vol. 5, p. 932; Acts 1879, p. 99; G.L. vol. 8, p. 1399; Acts 1951, 52nd Leg., p. 252, ch. 148, Sec. 1; Acts 1953, 53rd Leg., p. 61, ch. 48, Sec. 1."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 276

EMMETT GRAY,
Petitioner

vs.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Respondents

RESPONDENTS EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, AND PELICAN ISLAND DEVELOPMENT CORPORATION'S REPLY TO PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY EMMETT GRAY, PETITIONER

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Libellants in the Trial Court—Edwin E. Johans-

son, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation—denying jurisdiction as to them and denying error respectfully pray that the petition of Emmett Gray be denied.

The petition of Emmett Gray (Cause No. 276) and the petition of G. & H. Towing Company (Cause No. 277), we believe, both should have been filed by Petitioners in one case rather than splitting a single case into two separate causes, Nos. 276 and 277, in this Court. The case was tried in the Trial Court as a single case and was heard by the Court of Appeals in the same manner. Since, however, separate petitions have been filed here, we deem it necessary to answer separately. However, in order to give this Court the background on each petition, a considerable part of our Reply Statement and Argument will be identical in each cause.

STATEMENT AND ARGUMENT

Libellants below, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation and Pelican Island Development Corporation (hereinafter referred to as Libellants), being all the parties jointly interested in two pipe lines across Galveston Channel, recovered judgment in the Trial Court in rem against the Motor Vessel HAR CANAAN (whose anchor caught and broke one of these lines and whose claimant is Maritime Overseas Corporation) and in personam against Emmett Gray for his negligence and against G. & H. Towing Company, the

employer of Captain Gray, jointly and severally, for the damages sustained by reason of the negligent dropping of the HAR CANAAN'S anchor (R. 887). The Trial Court held that "Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipe lines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible" and "Captain Gray was not misled by the position of the warning signs and was negligent in giving the order to drop the anchor without regard to the presence of the pipe lines." (Findings Nos. 17 and 18, R. 883-884) and concluded that Captain Gray "is personally liable for his own acts of negligence" (Conclusion of Law No. 1 - R. 884). The Trial Court further found that "Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times" (Finding No. 20, R. 884) and concluded that "G. & H. Towing Company is liable for the negligence of Captain Gray as its employee" (Conclusion of Law No. 2 - R. 885). The HAR CANAAN was held liable in rem for the acts of Captain Gray (R. 885). Maritime Overseas Corporation (the claimant of the HAR CANAAN) concedes that if Captain Gray was negligent. the vessel is liable in rem.

Therefore, insofar as these Libellants are concerned, the case involves only fact questions as to the negligence of Captain Gray and his acting in the

course of his employment of G. & H. Towing Company.

Additionally, in the Trial Court, the HAR CANAAN and its claimant—Maritime Overseas Corporation (both hereinafter referred to jointly as Maritime) on one side and Captain Gray and the G. & H. Towing Company on the other side, extensively litigated the question of the so-called "pilotage clause" and the various rights of indemnity and contribution claimed between themselves. Libellants secured a judgment jointly and severally against the HAR CANAAN in rem, Captain Gray and the G. & H. Towing Company. We are not concerned with these various cross-claims as between these three parties.

The HAR CANAAN and its claimant, Maritime Overseas Corporation, appealed, claiming that Captain Gray was not negligent and, therefore, that the ship was not liable. The Court of Appeals on the fact question of negligence held against the Appellants, HAR CANAAN and Maritime Overseas Corporation. These Appellants did not file a motion for rehearing in the Court of Appeals and have not applied for certiorari here. We take it, therefore, that here as between us (Libellants below) and the HAR CANAAN in rem and Maritime Overseas Corporation as claimant, there is no question in dispute or controversy.

G. & H. Towing Company took its appeal and while complaining in part as to the Trial Court's finding of fact that Captain Gray was negligent and an employee of G. & H. Towing Company, primarily argued the effect of the pilotage clause and the indem-

nity features between it, G. & H. Towing Company, and Maritime. Captain Emmett Gray also appealed, contending that under the pilotage clause, he was entitled to some form of exoneration and also that he was not negligent. The Court of Appeals affirmed the Trial Court's findings of fact to the effect that the Appellant, Captain Emmett Gray, was negligent and that he and his employer, G. & H. Towing Company, were liable to us.

The Court of Appeals further held that Maritime was entitled to indemnity over against Gray and G. & H. Towing Company. Again, we are not interested in a controversy between Gray and the G. & H. Towing Company on the one hand and Maritime on the other.

The Petition for Certiorari here primarily deals with the controversy between Petitioner and the HAR CANAAN in rem and its claimant, Maritime Overseas Corporation.(1)

We cannot accept the "Statement" made in the petition as accurate in that it ignores most of the facts favorable to us, but in view of the limited argument made against us and our reply here, we do not believe that it would materially benefit this Court to make a more complete and accurate statement. If the Court

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(1) Strangely enough, while we are only involved in a minor way, we are named as the sole Respondents in the petition. Maritime Overseas Corporation and the HAR CANAAN are the parties against whom practically everything in the petition is directed but were not made or named as Respondents in the petition.